Supreme Court, U.S.
FILED
NOV 25 1998
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(5)

No. 97-1985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ELLIS E. NEDER, JR., PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the trial court's failure to instruct the jury on the materiality element in this case was harmless error because materiality was not in dispute at trial.

2. Whether materiality is an element of the crimes set forth in the federal mail fraud (18 U.S.C. Section 1341), wire fraud (18 U.S.C. Section 1343) and bank fraud (18 U.S.C. Section 1344) statutes.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-13a) is reported at 136 F.3d 1459. The judgment of the district court (Pet. App. 14a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1998. Pet. App. 14a-22a. The petition for a writ of certiorari was filed on June 9, 1998, and granted on October 13, 1998. 119 S. Ct. 334. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." 18 U.S.C. §§ 1341, 1343, 1344, and 26 U.S.C. § 7206(1) are reproduced at Pet. App. 43a-47a.

STATEMENT

1. On August 23, 1991, petitioner was indicted on multiple counts of federal tax, mail, wire and bank fraud in connection with a series of land acquisition and development transactions during the 1980s. J.A. 33-144. The indictment alleged that petitioner engaged in a scheme to defraud lenders by concealing material facts regarding the structure of the acquisition transactions and the source of certain deposit funds from buyers of petitioner's real estate developments.

Ibid. The government also alleged that petitioner's 1985 and 1986 income tax returns omitted material facts by failing to report the profits from these transactions.

The government's land acquisition charges specifically alleged that petitioner financed "land-flip" transactions. According to the government, petitioner used "shell" corporations that he controlled to purchase land from third-party titleholders at bargain prices, and then to sell those properties to himself at higher prices using inflated appraisals, with petitioner then keeping the excess loan proceeds as "profit." J.A. 42-44. The government further alleged that petitioner failed to disclose material facts to his lenders concerning his "nominee" relationship with the shell corporations. *Ibid.*

The government's land development charges alleged that petitioner fraudulently obtained loans to finance a variety of land development projects. J.A. 44-45. Specifically, the government alleged that to satisfy pre-sale commitment requirements of his lenders, petitioner solicited buyers by agreeing to advance their initial deposits, but failed to disclose those advances to the lenders. *Ibid.* The indictment further alleged that petitioner fraudulently obtained construction draws in connection with a particular project by presenting materially false invoices. J.A. 45-47.

Finally, the government's tax fraud charges alleged that petitioner's 1985 and 1986 tax returns failed to report $1,372,360 in income for 1985, and $4,355,766 in income for 1986, all allegedly derived from excess loan proceeds obtained from the real estate acquisition transactions. J.A. 122-123.

Petitioner pleaded not guilty to all counts of the indictment, and did not stipulate or admit to any element of the charges. Petitioner defended the land acquisition charges on the ground that the land parcels purchased by the "shell" corporations were acquired at prices well below fair market value, and were sold at the true fair market values utilized for the financing. Petitioner also contended that the appraisals used to obtain the financing were not inflated, and were approved by the lender. J.A. 190-191, 200-205 (closing argument). Petitioner also argued that the use of nominee corporations to acquire real estate was entirely proper, and that the lenders in question were

unconcerned about, and in some cases were aware of, the structure of these transactions. *Id.* at 171-188. Petitioner also defended the charges on the ground that he relied on the advice of his counsel and his accountant when structuring the transactions. *Id.* at 217-223.

Petitioner contested the land development fraud charges on the ground that, among other things, the loan documents did not prohibit him from advancing deposits to secure prospective buyers, and that petitioner did not refuse to disclose the source of those advances to any lender. J.A. 188-189. Petitioner also argued that his lender was aware of how his construction draws were being used, and had given its approval. *Id.* at 193-194. Finally, petitioner challenged the tax fraud charges on the ground that the funds cited by the government were not "income" for the 1985 and 1986 tax years, but were merely loan proceeds, and that under an allowable interpretation of the tax laws, the loan proceeds were not treated as "income" until the properties in question were sold in the future. *Id.* at 208-211.

2. Petitioner proceeded to trial in 1992. At the jury instruction conference, the government proposed the use of Eleventh Circuit pattern jury instructions which specified that the materiality of petitioner's alleged misrepresentations and omissions was for the *court* — not the jury — to decide. Petitioner's counsel objected on the ground that materiality should be decided by the jury. J.A. 165-166. The trial court overruled petitioner's objections. J.A. 166-167. While the trial court instructed the jury that materiality was an element of the offenses charged (J.A. 249), the court also "instructed the jury that if it found beyond a reasonable doubt that the alleged statements, representations, or promises were false, it need not consider whether they were material because materiality was not an issue for the jury to decide. The court entered its own findings regarding materiality outside the presence of the jury. Petitioner timely objected to the court's findings and its failure to submit the issue of materiality to the jury." Pet. App. 3a. See also J.A. 249, 251-252, 252-253, 256. During the trial, the trial court dismissed three counts of the indictment. J.A. 20. The jury also acquitted petitioner of eight charges relating to the submission of inflated appraisals, but convicted him on all other counts, including the mail, wire, bank and tax fraud counts. J.A. 27.

3. On June 19, 1995, while petitioner's direct appeal to the Eleventh Circuit was pending, this Court decided *United States* v. *Gaudin*, 515 U.S. 506 (1995), which held that the Constitution provides a criminal defendant with the "right to have the jury decide materiality." *Id.* at 511. On the basis of *Gaudin*, petitioner argued to the court of appeals that his convictions for mail, wire, bank and tax fraud all should be vacated because materiality is an element of each of those statutory offenses, and because the trial court's directed verdict on the element of materiality deprived him of the constitutional right to have the jury decide every element of the charged offenses.

The Eleventh Circuit affirmed petitioner's convictions. As to the tax fraud conviction under 26 U.S.C. § 7206(1), the Eleventh Circuit acknowledged that under *Gaudin*, the district court "erred in not submitting the element of materiality to the jury." Pet. App. 11a. However, following circuit precedent, the court of appeals held that "*Gaudin* errors do not require automatic reversal but are subject to harmless error analysis." Pet. App. 11a n.10. Specifically, in *United States* v. *Fern*, 117 F.3d 1298 (11th Cir. 1997), the Eleventh Circuit had held that "a *Gaudin* error does not fall within that limited class of errors known as 'structural errors,' *e.g.*, errors 'affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' To the contrary, a *Gaudin* error is more correctly viewed as analogous to improperly instructing the jury on an element of the offense, an error which is subject to harmless error analysis." *Id.* at 1307 (quoting *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997)).

Having found that the trial court's *Gaudin* error was subject to harmless-error review, the court of appeals proceeded to hold that the error was harmless "[b]ecause materiality was not in dispute with respect to Neder's tax fraud offense, [and thus] the district court's *Gaudin* error 'did not contribute to the verdict obtained.'" Pet. App. 13a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)).

The Eleventh Circuit also affirmed petitioner's mail, wire and bank fraud convictions, but on different grounds. Citing *United States* v. *Wells*, 519 U.S. 482 (1997), the court of appeals held that the trial

court's directed finding of materiality did not violate petitioner's rights under *Gaudin* because materiality is not an element of those offenses. The court held that materiality is not an element of the mail and wire fraud statutes (18 U.S.C. §§ 1341 & 1343) because they "do not contain the word 'material.' Further, § 1341 was enacted as part of the recodification of the federal criminal code in 1948, and § 1343 was patterned after § 1341. Based on these factors considered in *Wells*, we conclude that materiality is not an element of fraud offenses in §§ 1341 and 1343." Pet. App. 7a. The court reached the same conclusion as to the bank fraud statute (18 U.S.C. § 1344), because "its language, like § 1343, was patterned after § 1341." *Id.* at 9a.

The Eleventh Circuit acknowledged that unlike the statute in *Wells* (18 U.S.C. § 1014), which prohibits "false statements," §§ 1341, 1343 and 1344 punish a "scheme or artifice" either "to defraud" or to "obtain[]" money or property "by means of false or fraudulent pretenses, representations, or promises." However, rejecting the Ninth Circuit's contrary holding in *United States* v. *Nash*, 115 F.3d 1431, 1436 (1997), cert. denied, 118 S. Ct. 1054 (1998), the court held that the textual differences between § 1014 and §§ 1341, 1343 and 1344 were irrelevant under *Wells*:

> We disagree with the Ninth Circuit's analysis that since the term "representation" included "some notion of materiality at common law," this indicates that Congress intended for materiality to be an element of the bank fraud statute. * * * This ignores that Congress now has employed the terms "material representation" and "material misrepresentation" in other statutes. The fact that Congress uses the term "material" in conjunction with "representation" or "misrepresentation" in some statutes but not in others rebuts any presumption that Congress now intends to make materiality an element under a statute whenever it employs the term "representation" in that statute.

Pet. App. 9a. The court also rejected the view that "there is a materiality aspect to the determination whether the acts of an accused give rise to a scheme to defraud." *Id.* at 7a n.4 (citing *United States*

v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir. 1997)). Finally, the court rejected the argument that because § 1344 targets "fraud," it necessarily requires proof of materiality. According to the Eleventh Circuit, "[t]his approach is inconsistent with *Wells*, which disfavors inferring a materiality requirement where the statutory language does not expressly include one." Pet. App. 10a. Having concluded that materiality is not an element of §§ 1341, 1343 and 1344, the court of appeals held that the failure of the jury to decide the element of materiality as to those offenses did not violate *Gaudin*, and thus affirmed petitioner's mail, wire and bank fraud convictions.

SUMMARY OF ARGUMENT

I. At issue in this case is whether it can ever be harmless error for a trial court to direct a verdict in favor of the prosecution on an element of a charged offense — that is, for a person to stand convicted of a crime even though the jury never found him guilty beyond a reasonable doubt as to every element of the crime. The Eleventh Circuit answered this question in the affirmative, holding that the trial court's directed verdict on the materiality element of the tax fraud charges was subject to harmless-error review because, in the view of the court of appeals, "materiality was not in dispute regarding Neder's tax fraud offense," and therefore "the district court's *Gaudin* error 'did not contribute to the verdict obtained.'" Pet. App. 12a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)). The court thus "filled the gaps" in the jury's verdict and supplied the missing factual findings that the jury never made, based on nothing more than its own views concerning the record evidence. As we demonstrate below, the court of appeals' decision utterly disregards the right to trial by jury and patently misapplies this Court's harmless-error decisions, which confirm that harmless-error review is impermissible where the jury has not rendered a verdict on every element of the offense charged.

Under *Chapman* v. *California*, 386 U.S. 18 (1967), and its progeny, the harmless-error doctrine applies only where the jury actually has rendered a complete verdict on every element of the offense, and may then be used only to gauge whether the constitutional error contributed to the verdict *actually entered*. In this case, the court of appeals unhinged the harmless-error doctrine, using

it to *supply* factual findings that the jury never made on an element that the district court explicitly removed from the jury's consideration. Such misuse of the harmless-error doctrine squarely violates the Court's unanimous decision in *Sullivan* v. *Louisiana*, 508 U.S. 275, 280 (1993), in which this Court made clear that where a jury fails to render a complete verdict, "the entire premise of *Chapman* review is simply absent." Thus, "the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Ibid.* (emphasis in original). In this case, the court of appeals did precisely what *Sullivan* forbids.

The court of appeals justified its use of the harmless-error doctrine by finding that the materiality element of the tax fraud charges was "not in dispute," *i.e.*, based on nothing more than the court's own subjective perception of the record evidence. It has firmly been established for more than half a century, however, that a court may *never* direct a verdict of guilt regardless of how "overwhelming" the evidence may seem. Where, as here, the trial court has directed a verdict of guilt on an element of the offense charged, and the jury thus has failed to render a complete verdict on every element of the crime, the harmless-error doctrine has no application. In such a case, regardless of how "overwhelming" the evidence might appear to a reviewing court, "[t]he most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough." *Sullivan*, 508 U.S. at 280.

II. The federal mail fraud, wire fraud, and bank fraud statutes each prohibit a "scheme or artifice to defraud." 18 U.S.C. §§ 1341, 1343, 1344. This language, which Congress used when it first enacted the mail fraud statute in 1872, compels the conclusion that the statutes prohibit only schemes involving a *material* misrepresentation or omission.

It is a "cardinal rule of statutory construction" (*Molzof* v. *United States*, 502 U.S. 301, 307 (1992)) that this Court "presume[s] that

Congress incorporates the common-law meaning of the terms it uses if those terms * * * have accumulated settled meaning under * * * the common law and the statute [does not] otherwise dictate." *United States* v. *Wells*, 519 U.S. 482, 491 (1997) (internal quotation omitted). The word "defraud" thus brings with it the common-law elements of fraud, which have always included materiality. See, *e.g.*, *Smith* v. *Richards*, 38 U.S. (13 Pet.) 26, 39 (1839) (in action "to set aside a contract for fraud," "the misrepresentation must be of something material"); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996) ("Actionable fraud requires a material misrepresentation or omission").

The presumption that statutory language bears its common-law meaning can be overcome, but only if "Congress has unequivocally expressed an intent to the contrary." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 330 (1981). In this case, every indication leads to the conclusion that Congress meant the word "defraud" to bear its common-law meaning, including the materiality element. The early criminal analog of civil fraud that existed in 1872 (the crime of "false pretenses") required proof of materiality, and the legislative history, the early case law, and the surrounding statutory language all confirm a similar understanding of the mail fraud statute.

But even if there were any ambiguity as to the meaning of the mail fraud, wire fraud, and bank fraud statutes, they would still have to be interpreted to include a materiality element for at least two other reasons. First, because the word "defraud" so strongly implies that materiality is required, any other reading of the statutes would deprive citizens of their right "to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). Second, because "text, structure, and history fail to establish that the Government's position is unambiguously correct," the rule of lenity also requires that this Court "resolve the ambiguity in [petitioner's] favor." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994).

ARGUMENT

I. A DIRECTED VERDICT OF GUILT ON AN ELEMENT OF A CHARGED OFFENSE CANNOT CONSTITUTIONALLY BE SUBJECT TO HARMLESS-ERROR REVIEW.

"The right to have a jury make the ultimate determination of guilt has an impressive pedigree." *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995) (citing 4 W. BLACKSTONE, COMMENTARIES *343; 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 541 n.2 (4th ed. 1873)). As this Court has observed:

> It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.

Duncan v. *Louisiana*, 391 U.S. 145, 151 (1968). The right to a jury trial, in fact, was the only right proclaimed in each of the twelve state constitutions in existence prior to the Constitutional Convention, and is the only guarantee appearing in both the Constitution and the Bill of Rights. A.W. Alschuler & A.G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994).

A criminal defendant's right to trial by jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993). The right is all-encompassing, "giv[ing] a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of *every element* of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-523 (emphasis added). As this Court held in *In re Winship*, 397 U.S. 358 (1970), "'[n]o man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences,

to say that the evidence before them * * * is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.'" *Id.* at 363 (quoting *Davis* v. *United States*, 160 U.S. 469, 493 (1895)).

In this case, it is undisputed that petitioner's constitutional right to a jury determination of guilt or innocence was violated by the trial court's directed verdict of guilt on the materiality element of the tax fraud charges against him.[1] The court of appeals declared this constitutional violation "harmless" based upon its *own* factual finding that the element in question (materiality) was "not in dispute." Pet. App. 12a. The Eleventh Circuit's threshold decision to engage in harmless-error review, however, misapplied this Court's harmless-error decisions, which consistently have emphasized that the doctrine may not be used by reviewing courts to supply findings of guilt that the jury never made. Equally important, the court of appeals also disregarded this Court's decision in *Sullivan*, which held that where (as here) the jury has not rendered a complete verdict on every element of the offense charged, the harmless-error doctrine has no application. The court of appeals' decision to engage in harmless-error review must be reversed.

A. Harmless-Error Review Cannot Be Used To Supply Factual Findings On Elements That Were Removed Explicitly From The Jury's Consideration.

This Court's harmless-error jurisprudence consistently reflects the fundamental principle that the harmless-error doctrine only can be applied when the jury has rendered a complete verdict on every element of the offense charged. Without such a verdict, a reviewing court is no more entitled to fill the gaps in the jury's verdict than it would to direct a verdict of guilt (which is precisely what occurred below). In either case, the trial court's error plainly qualifies as

[1] The jury also convicted petitioner of mail, wire and bank fraud without any finding as to the materiality of his alleged representations or omissions. If, as petitioner contends (see Section II, *infra*), materiality is an element of those offenses, petitioner's conviction on those charges must be reversed for the same reason.

"structural" error, for there is nothing a reviewing court can do under the Constitution that would allow it to declare the error "harmless."

1. From its first articulation in *Chapman* v. *California*, 386 U.S. 18 (1967), the constitutional harmless-error doctrine has been carefully limited to those cases in which an otherwise valid conviction has been entered, and then only to avoid "reversal of the conviction if the State could show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Sullivan*, 508 U.S. at 279 (quoting *Chapman*, 386 U.S. at 24). See also *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). As *Chapman* explained, whenever a claim of harmless error is made, the court must address two distinct questions: "(1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?" 386 U.S. at 20. If the appellate court answers the first question in the negative, the error is one that cannot be harmless under the Constitution, rendering the second question moot and ending the harmless-error inquiry regardless of the strength of the evidence. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

Under *Sullivan*, the jury's failure to render a complete verdict on the tax fraud charges against petitioner is an error of such constitutional magnitude that it cannot be declared harmless. As *Sullivan* explained, "[h]armless-error review looks * * * to the basis on which 'the jury actually rested its verdict.'" 508 U.S. at 279 (quoting *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991)).[2] By focusing solely on the verdict actually entered by the jury,

> the question [*Chapman*] instructs the reviewing court to consider is *not* what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. * * * The inquiry, in other words, is not

[2] Accord R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 21 (1970) ("It is one thing for an appellate court to determine that a verdict was or was not affected by error. It is quite another for an appellate court to become in effect a second jury to determine whether the defendant is guilty").

> whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict *actually rendered* in this trial was surely unattributable to the error.

Ibid. (emphasis added). It follows, then, that the harmless-error doctrine applies *only* where the jury has "actually entered" a complete guilty verdict; it is *not* a license for appellate courts to supply a verdict, or a portion thereof, that the jury never entered. As *Sullivan* put it, for an appellate court "to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee." *Ibid.*

The foregoing principles compel the reversal of petitioner's tax fraud conviction because the jury that purportedly convicted petitioner of tax fraud did not find an element of that offense. See, *e.g.*, *United States* v. *DiRico*, 78 F.3d 732, 737 (1st Cir. 1996) (holding that *Gaudin* error in tax fraud case was not subject to harmless error review because materiality was not decided by the jury). The Constitution "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Gaudin*, 515 U.S. at 510. Without such a determination by the jury, "there has been no jury verdict within the meaning of the Sixth Amendment." *Sullivan*, 508 U.S. at 280. There is also, then, "no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Ibid.* (emphasis in original).

2. For an appellate court to declare the trial court's removal of an element of an offense harmless error based on its own view of the evidence concerning that element (as the Eleventh Circuit did below) is tantamount to affirming a directed verdict against the defendant on that element. In fact, that is *precisely* what occurred here. The trial court below not only instructed the jury that materiality "is not a matter for you to decide"; it actually decided materiality *itself*, directing a verdict in favor of the prosecution on that element. J.A. 166-167, 249, 251-252, 252-253, 256. The Constitution forbids such usurpation of the jury's function.

It is axiomatic that "although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277.[3] The prohibition against directed verdicts of guilt "stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases." *Rose* v. *Clark*, 478 U.S. 570, 578 (1986). As this Court explained in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), this categorical rule reaffirms the constitutional role of the jury as the exclusive finder of fact:

> In a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction.

Id. at 572-573 (citations omitted).

To direct a verdict of guilt on an element of a charged offense, and thus foreclose the jury's ability to decide that element, is an error of such constitutional dimension that it defies harmless-error scrutiny. Indeed, this Court confirmed in *Rose* that

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[3] Accord, *e.g.*, *Sparf* v. *United States*, 156 U.S. 51, 105 (1895) ("it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged, or of any criminal offense less than that charged"); *id.* at 174 (Gray, J., dissenting) ("the court can never order the jury to convict, for no one can be found guilty but by the judgment of his peers"); *Connecticut* v. *Johnson*, 460 U.S. 73, 83 (1983) (plurality) ("The Court consistently has held that 'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict * * * regardless of how overwhelmingly the evidence may point in that direction'") (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977)).

> harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. * * * This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. * * * Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; *the error in such a case is that the wrong entity judged the defendant guilty*.

478 U.S. at 578 (emphasis added) (citing *Martin Linen*, 430 U.S. at 572-73; *Carpenters & Joiners* v. *United States*, 330 U.S. 395, 408 (1947); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968)). See also *Arizona* v. *Fulminante*, 499 U.S. 279, 294 (1991) (White J., dissenting) (directed verdict for the State is among the "constitutional errors that invalidate a conviction even though there may be no reasonable doubt that the defendant is guilty and would be convicted absent the trial error"); R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 21 (1970) (same). Simply put, the complete removal of an element from the jury's consideration is an error that can never be regarded as harmless. To hold otherwise "would be to dispense with trial by jury." *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (Scalia, J., concurring).

3. Although most errors that occur during the trial process will be amenable to harmless-error scrutiny, there are certain "structural" errors that so fundamentally impair the right to a fair trial that they "defy analysis by 'harmless-error' standards" *(Fulminante*, 499 U.S. at 307-309), and thus "require reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577. A conviction rendered without a verdict of guilty beyond a reasonable doubt on every element of the offense charged is among those errors.

In *Fulminante*, this Court "distinguished between, on the one hand, 'structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards,' and, on the other hand, trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the

context of other evidence presented.'" *Sullivan*, 508 U.S. at 281 (quoting *Fulminante*, 499 U.S. at 307-309). An incomplete jury verdict is not attributable to the presentation of evidence. And like other errors that this Court has regarded as structural, there is nothing that a reviewing court can look to that would allow it to declare the error harmless since the court cannot constitutionally predict what the jury's verdict would have been if a complete verdict had been entered. As the Court held in *Sullivan*, where the jury's verdict is incomplete, "[t]he most an appellate court can conclude is that a jury *would surely have* found petitioner guilty beyond a reasonable doubt — not that the jury's *actual* finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. *That is not enough*." *Sullivan*, 508 U.S. at 280 (emphasis added). Accord *Cabana* v. *Bullock*, 474 U.S. 376, 384-385 (1986) ("Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime").

Sullivan held that a defective reasonable doubt instruction could not be reviewed for harmless error because the error produced an incomplete verdict that fundamentally deprived the defendant of his right to a jury determination of guilt or innocence:

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the [structural] sort, the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. * * * The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

508 U.S. at 281-282 (quoting *Rose*, 478 U.S. at 577; *Duncan*, 391 U.S. at 155). Accord *Duncan*, 391 U.S. at 149 ("trial by jury in criminal cases is fundamental to the American scheme of justice"); *Carella* v. *California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (the right to a jury determination of guilt "is a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life

and liberty of the citizen to one judge or to a group of judges'") (quoting *Duncan*, 391 U.S. at 156).

Just like the defective reasonable doubt instruction in *Sullivan*, the trial court's explicit removal of materiality from the jury's consideration below produced a constitutionally incomplete verdict. When such an error occurs, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence * * * and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577-578. If anything, the district court's directed verdict below was even *more* a "structural" error than that in *Sullivan*, which "neither * * * removed an element of the offense from the jury's consideration [n]or prevented the jury from considering certain evidence." *Sullivan*, 508 U.S. at 283 (Rehnquist, C.J., concurring). Here, by contrast, that is precisely what occurred.[4]

In short, *Sullivan* compels the conclusion that a trial court's removal of an element is a structural error because, in such a circumstance, "[a] reviewing court can only engage in pure speculation — its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Sullivan*, 508 U.S. at 281 (quoting *Rose*, 478 U.S. at 578).[5]

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[4] See G. Chernack, Note, *Silence Cannot Be Harmless:* United States v. Rogers, 106 YALE L.J. 2305, 2309 (1997) ("In *Sullivan*, the jury had considered all the issues but simply had not applied the proper standard; in *Rogers*, the jury failed to consider a necessary element of the offense. It is difficult to imagine why harmless-error review should be applied in the latter situation when such review is inappropriate in the former. By completely undermining the promise of trial by jury, an omitted instruction should lead to automatic reversal").

[5] See also J. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. REV. 819, 850 (1994) ("The very same logic in [*Sullivan*] compels the conclusion that a deprivation of the rights to have the jury make all elemental determinations and to consider all admitted, elementally relevant evidence — rights as much a part of the Sixth Amendment's jury-trial guarantee as the right to a jury verdict of guilty beyond a reasonable doubt — constitutes structural error").

Accord *Carella*, 491 U.S. at 269 (Scalia, J., concurring) (where essential factual issue is omitted, "the problem would not be cured by an appellate court's determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury"). The absence of an actual jury verdict on each essential element of the offense thus "unquestionably qualifies as 'structural error.'" *Sullivan*, 508 U.S. at 281-282.

B. This Court's Instructional Error Decisions Make Clear That The Harmless-Error Doctrine Is Inapplicable When The Jury Has Failed To Render A Complete Verdict On Every Element Of The Offense Charged.

1. In confronting the question whether, and to what extent, instructional errors are amenable to harmless-error scrutiny, the Court consistently has adhered to the fundamental principle that an appellate court may not serve as the finder of fact. In *Carpenters & Joiners* v. *United States*, 330 U.S. 395 (1947), for instance, the trial court failed properly to instruct the jury that the defendants could be found guilty of conspiracy to violate the antitrust laws only if the defendants actively participated in the conspiracy. This Court reversed the conviction, despite clear record evidence that the defendants had in fact participated in the alleged conspiracy, expressly refusing to weigh the evidence to determine whether the conspiracy element had been established:

> We do not enter into an analysis of the evidence that was relied upon to show the participation of the unions in the conspiracy. * * * No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under § 6 of such association or organization for acts of its agents. *For a judge may not direct a verdict of guilty no matter how conclusive the evidence.*

330 U.S. at 408-409 (emphasis added). The constitutional prohibition on directed guilty verdicts in criminal cases equally prohibits appellate courts from seeking to cure incomplete jury verdicts by finding that the evidence established the missing elements of guilt beyond a reasonable doubt. As Justice Scalia has explained:

> A defendant may assuredly insist upon observance of [the jury trial] guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State. That is also why in [*Carpenters*] the Court did not treat as harmless a jury instruction that mistakenly did not require express authorization or ratification to hold a union criminally liable for its officers' participation in an antitrust conspiracy — regardless of how overwhelming the evidence that authorization or ratification in fact existed.

Carella, 491 U.S. at 268-69 (concurring opinion) (citations omitted).

In contrast to the circumstances presented in *Carpenters*, it is possible that a jury, while misinstructed on an element, may nonetheless find the facts necessary to establish the proper element beyond a reasonable doubt. For instance, in *Pope* v. *Illinois*, 481 U.S. 497 (1987), the jury was instructed that it should base its determination whether the materials at issue were criminally obscene upon how ordinary adults in the State of Illinois would view the material. The Court ruled that this instruction was flawed under the First Amendment, because obscenity should be judged not from the perspective of "an ordinary member of any given community," but rather from that of "a reasonable person." *Id.* at 500-501. The Court remanded the case to the state appellate court to determine whether the error was harmless. *Id.* at 504.

Although finding that the erroneous jury instructions were subject to harmless-error scrutiny, *Pope* is fully consistent with the basic principle, reflected in *Carpenters*, that an appellate court may not supply a factual finding that the jury never made. As the *Pope* Court explained, when determining whether to engage in harmless-

error review, an appellate court in a misdescription case must determine whether "the facts that the jury necessarily found established guilt beyond a reasonable doubt." 481 U.S. at 503. What distinguished *Pope* from *Carpenters*, then, was that "the jurors [in *Pope*] were not precluded from considering" any element of the offense charged. *Ibid.* As Justice Scalia later explained, the error in *Pope* was subject to harmless-error review because "no rational juror could plausibly have found the magazines utterly lacking in value under a community standard and come to a different conclusion under a reasonable person standard." *Carella*, 491 U.S. at 271 (concurring opinion). Thus, the appellate court in *Pope* validly could conclude that the jury actually found the required element notwithstanding its misdescription in the jury instructions.

Read in tandem, *Carpenters* and *Pope* demonstrate that, at least analytically, the wholesale omission of an element is "as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission.'" *Roy*, 117 S. Ct. at 339. See also *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997) (same). Omissions and misdescriptions each can "deprive[] the jury of its factfinding role" and thus will "circumscribe the availability of harmless-error analysis." *Carella*, 491 U.S. at 269, 270 (Scalia, J., concurring). But in either event, the instructional error can be subject to harmless-error scrutiny *only* where the facts found by the jury under the instructions actually given "are so closely related" to the element omitted by the trial court "that no rational jury could find those facts without also finding" the facts necessary to establish the omitted element beyond a reasonable doubt, such that "making those findings is functionally equivalent to finding the [omitted] element." *Sullivan*, 508 U.S. at 281. Accord B. Rosenberg, *The Effect of* Sullivan v. Louisiana *on Harmless Error Analysis of Jury Instructions That Omit an Element of the Offense*, 29 RUTGERS L.J. 315, 323-26 (1998).

In short, instructional errors concerning a particular element "can be harmless only if the jury verdict on other points effectively embraces [the element] or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as

well." *Roy*, 117 S. Ct. at 339-340 (Scalia, J., concurring). "The error is harmless in this situation because it is beyond a reasonable doubt that the jury found the facts necessary to support the conviction." *Yates*, 500 U.S. at 406 n.10. On the other hand, where, as here, the erroneous instructions allow the jury to convict *without* finding "the facts necessary to support the conviction," the error simply is not subject to harmless-error scrutiny.

2. While analytically similar, instructional errors involving omissions, misdescriptions and presumptions will likely differ in the frequency with which they are amenable to harmless-error review — that is, in the frequency with which it can be determined that the jury actually found the element despite the error. Logically, it will be far less likely in the case of an omission that the jury's verdict on other elements necessarily embraced the omitted element because, by definition, the jury will have received *no* direction as to that element.

Erroneous presumptions are different. "Because a presumption does not remove [an element] from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Rose*, 478 U.S. at 580 n.8 (quoting *Connecticut* v. *Johnson*, 460 U.S. at 95 n.3 (Powell, J., dissenting)). "When a jury is instructed to presume [an element] from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." *Id.* at 580. In other words, the record may show that the erroneous presumption was unimportant in relation to everything else the jury considered on the issue in question, such that "[a] reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt beyond a reasonable doubt." *Sullivan*, 508 U.S. at 281 (citing *Yates*, 500 U.S. at 402-406). Likewise, in the case of a simple misdescription (as in *Pope*), the erroneous instruction may be simply "superfluous" to the extent that "the predicate facts conclusively establish" the ultimate fact. See *Rose*, 478 U.S. at 580-581.

In contrast to an erroneous presumption (and many misdescriptions), the complete removal of an element by the trial court deprives the jury of an opportunity to find the element required for conviction. In such a case, it would be impossible for a reviewing

court to determine that the jury actually found the proper element despite the instructional error — particularly where, as here, the trial court explicitly directed the jury *not* to consider that element and decided that element itself. If a conclusive presumption "tend[s] to deter a jury from considering any evidence for the presumed fact beyond the predicate evidence" (*Yates*, 500 U.S. at 406 n.10), the complete *removal* of an element completely precludes the jury's consideration of that element.

When faced with the omission of an element from the jury instructions, a reviewing court can find that the jury found the facts establishing the omitted element only if the jury instructions *actually given* necessarily embraced the missing element. As Justice Scalia has explained, *Pope* was such a case because the jury could not have found a magazine obscene under a "community" standard without also finding it obscene under a "reasonable person" standard. *Carella*, 491 U.S. at 271 (concurring opinion). In *Carpenters*, by contrast, a finding of guilt in accordance with the jury charge did not require the jury to find that the defendants actively engaged in a conspiracy beyond a reasonable doubt. *Carpenters*, 330 U.S. at 407 & n.19. Notwithstanding the apparent strength of the evidence, nothing the jury was asked to consider in *Carpenters* required it to make the requisite finding. *Id.* at 408.

In short, the focus in each of this Court's instructional error cases always has been on what the jury actually found — not on what the jury hypothetically would have found had it been instructed correctly. See *Sullivan*, 508 U.S. at 279-280. Indeed, *never* has this Court allowed a trial or reviewing court to decide a factual element of a crime that the jury did not consider. Under *Sullivan*, "a criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime, and absent such a verdict the conviction must be reversed, 'no matter how inescapable the findings to support that verdict might be.'" *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring) (quoting *Sullivan*, 508 U.S. at 279). In this case, it is undisputed that the jury *never* made any findings concerning the materiality of any of the representations or omissions alleged by the government. Under

Gaudin, this was clearly a question for the jury to decide. *Sullivan* thus compels the reversal of petitioner's convictions.

C. Removal Of An Element From The Jury's Consideration Cannot Be Cured By An Appellate Court's Finding That The Element Was "Not In Dispute," Or That The Evidence Of Guilt Was "Overwhelming"

The Eleventh Circuit justified its use of the harmless-error doctrine by finding that the materiality element of the tax fraud charges "was not in dispute." Pet. App. 12a. This "finding," however, simply reflects the court of appeals' own perception of the evidence at trial. Petitioner did not admit to *any* element of the offenses with which he was charged. Nor did he plead guilty to any charges. Thus, the fact that the court of appeals may have viewed the evidence concerning materiality as "not in dispute," or even "overwhelming," provided no constitutional basis for invoking harmless-error review.

1. An accused who (like petitioner) wishes to contest the charges against him need only enter a general plea of not guilty. "In the federal courts, '[a] simple plea of not guilty * * * puts the prosecution to its proof as to *all* elements of the crime charged.'" *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991) (quoting *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988)) (emphasis added).[6] After pleading not guilty, even a defendant who breaks down and openly admits his or her guilt on the stand is "justified * * * in defending solely in reliance on the presumption of his innocence and the State's burden of proof." *Connecticut* v. *Johnson*, 460 U.S. at 87 n.16 (plurality opinion).

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[6] Accord *Old Chief* v. *United States*, 117 S. Ct. 644, 659 (1997) (O'Connor, J., dissenting) ("[a]t trial, a defendant may * * * choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element"); *Roe* v. *United States*, 287 F.2d 435, 440 (5th Cir. 1961) (a "plea of not guilty puts all in issue, even the most patent truths").

Thus, regardless of whether materiality was the central focus of the trial on petitioner's tax fraud charges, the government clearly had the burden of proving materiality beyond a reasonable doubt, and the jury alone was constitutionally required to decide whether that element was established.

2. That a reviewing court may view an element removed by the trial court from the jury's consideration as "not in dispute," or the evidence of guilt concerning that element as "overwhelming," provides no justification for engaging in harmless-error review. Where, as here, the trial court has directed a verdict for the State on a particular element, the strength of the evidence on that element is completely irrelevant. As this Court held in *Sullivan*, a trial court "may not direct a verdict for the State, *no matter how overwhelming the evidence*." 508 U.S. at 277 (emphasis added).

Whether a particular error is amenable to harmless-error scrutiny has nothing to do with the nature or strength of the *evidence*. It depends entirely on the nature of the *error*. For this reason, a structural error is "not curable by overwhelming record evidence of guilt." *Carella*, 491 U.S. at 270 (Scalia, J., concurring) (citing *Carpenters*, 330 U.S. at 408-409). Under *Chapman*, the first question an appellate court must ask is whether the error is even suitable to harmless-error scrutiny. Only if the harmless-error doctrine can constitutionally be applied may the appellate court then address whether, in light of the evidence adduced at trial, the error actually was harmless. *Sullivan*, 508 U.S. at 280. For this reason, a "structural" error that "def[ies] analysis by 'harmless-error' standards" (*Fulminante*, 499 U.S. at 307-309), "require[s] reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577.

Last Term, in *Rogers* v. *United States*, 118 S. Ct. 673 (1998), even the government conceded "that language in some of this Court's recent harmless-error decisions indicates that, as a general matter, it is inappropriate to rely on 'overwhelming evidence' to determine what a jury would have found in the absence of an error, as distinguished from what the jury actually did find despite that error." Brief for the United States, *Rogers* v. *United States*, No. 96-1279, at 24 (citing

Sullivan, 508 U.S. at 280; *Yates*, 500 U.S. at 404; *Roy*, 118 S. Ct. at 389 (Scalia, J., concurring)).

Where the jury's verdict is incomplete, the harmless-error doctrine is inapplicable regardless of how "overwhelming" the evidence of guilt may seem for the simple reason that there is *nothing* a reviewing court can do under the Constitution that would allow it to declare the error "harmless." Not even the presence of "overwhelming" evidence can mitigate the total removal of an element since no amount of evidence can show that the jury actually found what it was never directed to find (or, in this case, was told *not* to find). See *Carella*, 491 U.S. at 270 (Scalia, J., concurring) ("misdescription of an element of the offense has * * * been held not curable by overwhelming record evidence of guilt") (citing *Carpenters*, 330 U.S. at 408-409). Thus, where the jury fails to render a verdict on every element of the offenses charged, reversal is required "no matter how inescapable the findings to support that verdict might be." *Sullivan*, 508 U.S. at 279.

In deciding to apply the harmless-error doctrine to the trial court's directed verdict on the element of materiality, the Eleventh Circuit mistakenly assumed that "[b]ecause materiality was not in dispute with respect to Neder's tax fraud offense, the district court's *Gaudin* error 'did not contribute to the verdict obtained.'" Pet. App. 13a (quoting *Yates*, 500 U.S. at 403). In making this assumption, the court of appeals plainly misunderstood the nature of the constitutional error that occurred.[7] As this Court explained in *Sullivan*, where the

[7] The Eleventh Circuit also misapplied this Court's decision in *Yates*. As discussed *supra* at 20-21, *Yates* did not involve an omitted element, but rather a defective presumption. Even in that context, *Yates* confirmed that "[t]o satisfy *Chapman*'s reasonable-doubt standard, it will not be enough that the jury considered evidence from which it *could have* come to the verdict without reliance on the presumption. Rather, the issue under *Chapman* is whether the jury *actually rested* its verdict on evidence establishing the presumed fact beyond a reasonable doubt, *independently of the presumption*." 500 U.S. at 404 (emphasis added). As explained *supra* at 21-22, it would be impossible, in a case like this one, for a reviewing court to find that the jury

jury has not rendered a verdict on every element of the charged offense, the harmless-error doctrine is inapplicable because the "error" is that no constitutional "verdict" was rendered in the first place. For a reviewing court to declare such an error harmless would mean that the "the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578. Contrary to the Eleventh Circuit's apparent assumption, when the trial court completely removes an element from the jury's consideration, the error necessarily "contribute[s] to the verdict obtained."

If anything, the court of appeals' decision itself confirms that without a complete verdict by the jury on every element, the *only* way that an appellate court can purport to remedy the removal of an element is by weighing the record evidence itself and guessing what the jury would have decided had it considered the omitted element. As this Court explained in *Sullivan*, that is why the harmless-error doctrine cannot be applied to an incomplete jury verdict:

> Since * * * there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless.

Sullivan, 508 U.S. at 280 (citing *Yates*, 500 U.S. at 413-414 (Scalia, J., concurring); *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946)). To allow an appellate court to declare the removal of an element harmless based on the court's perception that the element was established by "overwhelming" evidence, or that the element was "not in dispute," would be tantamount to allowing directed verdicts

"actually rested" its verdict on evidence regarding an element that the trial court explicitly removed from the jury's consideration. By taking the element of materiality away from the jury, there simply was "nothing in the instruction[s] [that] would have directed the jury, or even permitted it, to consider and apply [the evidence pertaining to that element] in reaching its verdict." *Carella*, 491 U.S. at 269 (Scalia, J., concurring).

of guilt based on "overwhelming evidence." See *Sullivan*, 508 U.S. at 280 ("[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal").

Where, as here, the trial court has taken an element completely away from the jury, and thus produced an incomplete jury verdict, "the problem would not be cured by an appellate court's determination that the record evidence established guilt, for that would represent a finding of fact by judges, not by a jury." *Carella*, 491 U.S. at 269 (Scalia, J., concurring). Thus, simply put, "[t]he absence of a formal verdict on [an element] can not be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury." *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring).[8]

[8] Accord, *e.g.*, *Connecticut* v. *Johnson*, 460 U.S. at 86 (plurality opinion) ("The fact that the reviewing court may view the evidence [on an element] as overwhelming is * * * simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence * * * when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made"); *United States* v. *Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring) ("A federal appellate court should not find harmless error merely because it believes that the other evidence is 'overwhelming'"); *Henderson* v. *Morgan*, 426 U.S. 637, 650 (1976) (White, J., concurring) ("It cannot be 'harmless error' wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged"); *Bollenbach*, 326 U.S. at 615 ("[i]n view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be").

D. Complete Removal Of An Element Requires Reversal To Preserve The Constitutional Right To A Jury Trial.

The court of appeals believed it was entitled to "fill the gaps" left open by a trial court's instructional errors based on its perception that the element omitted from the jury's verdict was "not in dispute" anyway. Pet. App. 12a. If upheld, such unprecedented use of the harmless-error doctrine would substantially and inexorably erode the Constitution's explicit jury trial guarantees. For this reason, it is imperative that the right to have "a jury determine, beyond a reasonable doubt, [a person's] guilt of every element of the crime with which he is charged" (*Gaudin*, 515 U.S. at 522-523) be rigidly enforced without exception.

Sullivan is the touchstone here precisely because of its explicit rejection of "earlier cases embracing the idea that the harmlessness of an error may be gauged simply through an appellate court's own assessment of guilt." H.T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1201 (1996).[9] Yet, despite *Sullivan's* unambiguous command, appellate courts have continued to use harmless-error review as a means of affirming the convictions of those persons whom the reviewing courts believe to be guilty. As Chief Judge Edwards explained, "the seductiveness of this approach is its chief defect, for, drawn in by its attractions, we have applied the harmless-error rule to such an extent that it is my impression that my colleagues and I are inclined to invoke it almost automatically where the proof of a defendant's guilt seems strong." *Id.* at 1170.

This Court observed in *Duncan* v. *Louisiana* that the right to trial by jury embodies "a profound judgment about the way in which law should be enforced and justice administered," with the jury serving as a structural safeguard "to prevent oppression by the Government" and to ensure "community participation in the determination of guilt or innocence." 391 U.S. at 155, 156. The

[9] Thus, as the Court recently pointed out in *Johnson* v. *United States*, 117 S. Ct. at 1550, where an essential element has been removed from the jury's consideration, *Sullivan* is "the case most closely on point."

Court also acknowledged the "impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court." *Id.* at 153-54. Indeed, the right to a jury determination of guilt or innocence has long been regarded an essential safeguard against "the tyranny of popular magistrates in a popular government" (THE FEDERALIST NO. 83 (A. Hamilton) (C. Rossiter ed. 1961)), and "'a sacred part of our legal privileges.'" *Gaudin*, 515 U.S. at 513 (quoting 1 S. SMITH & T. LLOYD, TRIAL OF SAMUEL CHASE 34 (1805)).[10]

As first-hand observers of the trial process itself, jurors are uniquely suited to make the countless credibility and other factual determinations that are crucial to a fair and reliable assessment of guilt or innocence. Appellate judges, by contrast, necessarily are limited to a "dead" record, and thus are ill-equipped to resolve factual controversies or to make credibility determinations. As Justice Stevens put it, trial "testimony and accompanying exhibits are much more difficult to assimilate and fully comprehend from the cold record than in the living trial, and of course we do not have the opportunity to make assessments of the demeanor of the witnesses." *Colorado* v. *New Mexico*, 467 U.S. 310, 326 (1984) (dissenting opinion). Accord *Caldwell* v. *Mississippi*, 472 U.S. 320, 330 (1985); *United States* v. *Bayer*, 331 U.S. 532, 536-537 (1947).[11]

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[10] See also G. Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1366 (1994) ("The defendant's Sixth Amendment right to a jury verdict dictates adoption of the harmless-error test that best limits appellate-level intrusion on the jury's factfinding role. It is worth remembering that if a court finds an error harmful, the remedy is a new trial, not a permanent release. Reversal for harmful error means only that the defendant will have a second chance at a fair result by a fair process").

[11] See also Edwards, *supra*, 70 N.Y.U. L. REV. at 1193-1194 ("The very nature of the appellate function leaves judges of the courts of appeals poorly equipped to make * * * guilt determinations. An appellate judge's view of the trial is limited to the record, and, as any observer of the judicial process is aware, many events of trial pass without casting so much as a shadow upon the printed transcript. The appellate judge cannot watch the demeanor of witnesses, listen to the intonations of their voices, or engage in any of the countless other observations that inhere in an assessment of credibility"); Mitchell, *supra*, 82 CAL. L. REV. at 1340, 1353 (same).

To preserve the sanctity of the jury as the exclusive finder of fact, the line establishing the respective domains of the judge and jury in the process of adjudicating guilt must be rigidly observed without regard to the perceived weight of the evidence. Requiring reversal where an element of the crime has been removed from the jury's consideration "is simply the price for assuring that the jury's role as the voice of the community's 'standards, morals [and] principles' is not stifled." Rosenberg, *supra*, 29 RUTGERS L.J. at 329 (quoting *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 n.15 (1968)). If appellate courts are given even the slightest latitude to review the record to "fill the gaps" in a jury verdict, as "minor" as those gaps may seem, there will be no principled means of preventing the complete erosion of the right to trial by jury. As Blackstone warned long ago, any "inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and . . . *though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.*" 4 W. BLACKSTONE, COMMENTARIES *344 (emphasis added).

In *Sullivan*, this Court strongly reaffirmed its commitment to the fundamental principle that it can never be harmless for a person to stand convicted of a crime when the jury has not found every element of the crime beyond a reasonable doubt. The Court should again confirm that that is where the constitutional line has been drawn, and hold that the court of appeals crossed it.

II. MATERIALITY IS AN ELEMENT OF THE FEDERAL MAIL FRAUD, WIRE FRAUD, AND BANK FRAUD STATUTES.

A. The Plain Language Of The Mail Fraud, Wire Fraud, And Bank Fraud Statutes Confirms That Materiality Is An Element Of Each Crime.

1. When Congress first enacted the mail fraud statute in 1872, it punished "any person having devised or intending to devise any scheme or artifice to defraud * * * by means of the post-office establishment" and making the requisite use of the mails.[12] The phrase "scheme or artifice to defraud" remains unchanged in the current mail fraud statute, 18 U.S.C. § 1341. Congress also incorporated the phrase without change into the wire fraud and bank fraud statutes, 18 U.S.C. §§ 1343 and 1344.[13] None of these statutes defines the phrase

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[12] The original mail fraud statute provided:

> That if any person having devised or intending to devise any scheme or artifice to defraud, [to] be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor * * *.

Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323.

[13] The language of the three statutes is nearly identical. The only significant difference is the jurisdictional element, which under 18 U.S.C. § 1343 is the use of interstate wire facilities, and under 18 U.S.C. § 1344 is the involvement of a federally insured bank. Thus, this Court has recognized that the mail fraud and wire fraud statutes are to be interpreted *in pari materia*. *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987). Likewise, the bank fraud statute, which was enacted in 1984, was "modeled

"scheme or artifice to defraud." Rather, Congress left "the matter of what conduct may constitute such a scheme for determination under other laws." *Parr* v. *United States*, 363 U.S. 370, 389 (1960).

The language chosen by Congress demonstrates that the statutes prohibit only schemes involving a *material* misrepresentation or omission — meaning one that "has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (internal quotations omitted).[14] It is a "cardinal rule of statutory construction" that the Court will assume, in the absence of evidence of a contrary congressional intent, that statutory language carries its settled common-law meaning. *Molzof* v. *United States*, 502 U.S. 301, 307 (1992). Here, every indication is that Congress, in using the phrase "scheme or artifice to defraud," had no intention of departing from the common law's long-held understanding that

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on the present wire and mail fraud statutes which have been construed by the courts to reach a wide range of fraudulent activity. Like these existing fraud statutes, the proposed bank fraud offense proscribes the conduct of executing or attempting to execute 'a scheme or artifice to defraud' or to take the property of another 'by means of false or fraudulent pretenses, representations, or promises.'" S. Rep. No. 98-225, at 378 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3519.

[14] In addition to a "scheme or artifice to defraud," the statutes also refer to a "scheme or artifice" employing "false or fraudulent pretenses, representations, or promises." This additional language does not furnish an independent basis of criminal liability. As this Court explained in *McNally* v. *United States*, 483 U.S. 350, 357-359 (1987), Congress added this language in 1909 merely to codify the holding in *Durland* v. *United States*, 161 U.S. 306, 313 (1896), that the mail fraud statute's prohibition on "scheme[s] or artifice[s] to defraud" reaches "representations as to the past or present, or suggestions and promises as to the future." See also *Pereira* v. *United States*, 347 U.S. 1, 8 (1954) ("The elements of the offense of mail fraud * * * are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme."). But even if this additional language had independent significance, it nevertheless would require proof of materiality by its own terms. See *infra* at 45-46.

"fraud" requires a material misrepresentation or omission. See *infra* at 32-35.

2. In *United States* v. *Wells*, 519 U.S. 482 (1997), this Court addressed whether materiality is an element of the "false statement" offense in 18 U.S.C. § 1014. In so doing, the Court "of course, presume[d] that Congress incorporates the common-law meaning of the terms it uses if those terms * * * have accumulated settled meaning under * * * the common law and the statute [does not] otherwise dictate." 519 U.S. at 491 (internal quotations omitted). As the Court has explained:

> where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Morissette v. *United States*, 342 U.S. 246, 263 (1952). See also, *e.g.*, *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under * * * the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59 (1911) ("where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense"). "'[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it.'" *Moskal* v. *United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) (quoting F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

In *Wells*, the defendant made "no claims about the settled meaning of 'false statement' at common law," and this Court discerned no common-law meaning of the term "false statement" that supported a materiality requirement in § 1014. 519 U.S. at 491 &

n.10. Here, by contrast, the term "defraud" has a firm common-law meaning. As this Court recently noted in construing similar language:

> "[F]alse pretenses, a false representation, or actual fraud" carry the acquired meaning of terms of art. They are common-law terms, and * * * they imply elements that the common law has defined them to include. Congress could have enumerated their elements, but Congress's contrary drafting choice did not deprive them of a significance richer than the bare statement of their terms.

Field v. *Mans*, 516 U.S. 59, 69 (1995) (citations omitted). So too, Congress's use of the term "defraud" in the mail fraud, wire fraud, and bank fraud statutes incorporated the common-law elements of fraud, which always have included materiality.

3. At common law in 1872, it was, as it remains today, impossible to "defraud"[15] without a *material* misrepresentation or omission. *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996) ("actionable fraud requires a material misrepresentation or omission") (citing RESTATEMENT (SECOND) OF TORTS § 538 (1977); W. KEETON, ET AL., PROSSER & KEETON ON LAW OF TORTS § 108 (5th ed. 1984)). The law has never recognized such a thing as fraud involving only immaterial falsehoods.

Courts have always been reluctant to define "fraud" too precisely, fearing that an exact definition "would be in effect telling to the crafty precisely how to avoid the grasp of the law." *McAleer* v. *Horsey*, 35 Md. 439, 452 (1872). Yet the elements of fraud — and the essence of what "fraud" is — have *always* included materiality. See *ibid.* ("the fraud must be material"). As Justice Story explained, "[i]n the first place, the misrepresentation must be of something material, constituting an inducement or motive to the act or omission

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[15] Although materiality is most commonly discussed as a requirement of "fraud," to "defraud" is simply "[t]o practice fraud." H. BLACK, A DICTIONARY OF LAW 347 (1891); BLACK'S LAW DICTIONARY 423 (6th ed. 1990) (same). See also 1 J. BOUVIER, A LAW DICTIONARY 546 (10th ed. 1860) (single entry for "FRAUD, TO DEFRAUD").

of the other party." 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 195 (10th ed. 1870). See also *id.*, §§ 191-196; 37 AM. JUR. 2D *Fraud and Deceit* § 177, at 236-237 (1964) (collecting cases and stating that "one of the fundamental principles which pervades jurisprudence involving fraud, and the maintenance of actions or defenses based thereon, is that to constitute fraud in any case, the facts misrepresented or concealed must have been material facts").

At common law, "fraud" did not describe a particular action, but was, rather, a concept incorporated into various actions. At the time when Congress first enacted the mail fraud statute, courts had most often discussed "fraud" in the context of actions in tort for deceit, actions in equity to rescind a fraudulently induced contract, and actions in assumpsit for breach of a contract containing a fraudulent warranty.[16] All three actions required proof of materiality. For example, in an 1872 deceit case seeking damages for "false and fraudulent representations," the Maryland high court held that "the fraud must be material to the contract or transaction * * *, for if it relate to another matter or to this only in a trivial or unimportant way, it affords no ground for the action of the Court." *McAleer*, 35 Md. at 452. See also *id.* at 457-458 (actionable misrepresentation concerned "a substantial and most material fact" that "would naturally and unquestionably have great influence in inducing the purchase"). The court further explained that a "sale is voidable" when the buyer is misled by a "representation [that] is false in any one substantial circumstance, going to the inducement or essence of the bargain." *Id.* at 457. Similarly, in an assumpsit case of the same period, the Virginia Supreme Court of Appeals relied on earlier case law recognizing that "there is fraud to support an action of deceit at law, and to be a ground for the rescission of the transaction in equity" when a misrepresentation would "induce a reasonable man to believe

[16] Fraud concepts in criminal law are discussed *infra* at 36-38.

that it * * * is meant to be acted on." *Herron* v. *Dibrell*, 12 S.E. 674, 676 (Va. 1891).[17]

This Court's decisions also squarely demonstrate that there was no doubt in 1872 that "fraud" required a material falsehood. See, *e.g.*, *Slaughter's Administrator* v. *Gerson*, 80 U.S. (13 Wall.) 379, 383 (1872) (avoidance of contract due to "misrepresentation and fraud" required a misrepresentation that "relate[d] to a material matter"); *Smith* v. *Richards*, 38 U.S. (13 Pet.) 26, 39 (1839) (in action "to set aside a contract for fraud," "the misrepresentation must be of something material").

This Court's standard presumption that statutory language bears its normal, common-law meaning thus compels the conclusion, absent strong evidence of a contrary congressional intent, that the term "defraud" in the mail fraud, wire fraud, and bank fraud statutes requires proof of a material misrepresentation or omission.

B. Congress Did Not Intend To Alter The Common-Law Meaning Of "Fraud" In The Mail Fraud, Wire Fraud, And Bank Fraud Statutes.

To be sure, if a statute "otherwise dictate[s]," this Court will not interpret statutory language to carry its common-law meaning. *Wells*, 519 U.S. at 491. See *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 740 (1989) (relying on common-law meaning of terms because "[n]othing in the text * * * indicate[d]" a contrary intent); *Amax Coal*, 453 U.S. at 330 (Court would interpret statute to

[17] Deceit, equitable remedies, and assumpsit were not the only means of redressing fraud. See, *e.g.*, *Snow* v. *Alley*, 11 N.E. 764 (Mass. 1887) (action for trover, which cannot be maintained until after rescission of the underlying contract). See generally P. Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405 (1995). Variations of fraud existed in both function and form. In Pennsylvania, for instance, the action was in "trespass for deceit." See, *e.g.*, *Lare* v. *Westmoreland Specialty Co.*, 25 A. 812 (Pa. 1893). As with the other actions for fraud, Pennsylvania law required the statement or omission in question to be material. *Dunbar* v. *Preston*, 132 A. 707, 708 (Pa. 1926).

incorporate settled equitable principles "unless Congress has unequivocally expressed an intent to the contrary"). But *nothing* in the text of the mail fraud, wire fraud, and bank fraud statutes signals a congressional intent to abandon the common-law materiality element. Just the opposite, every indication is that Congress intended the mail fraud statute — and thus the wire fraud and bank fraud statutes — to incorporate the common law requirement of materiality.

1. While the term "fraud" historically has been a term of civil, rather than criminal, law, the fact that the mail fraud, wire fraud, and bank fraud statutes are criminal laws provides no basis for divorcing them from the language Congress chose. The criminal analogs of civil fraud that existed in 1872 were, like civil fraud itself, unyielding in their insistence that immaterial falsehoods were insufficient. A criminal fraud statute that did not require materiality would have been utterly foreign to the law in 1872.[18]

The early crime that most closely resembled civil fraud was "false pretenses." England first criminalized false pretenses with a 1757 statute that outlawed obtaining the property of another by "false pretence * * * with intent to cheat or defraud." 30 Geo. 2, ch. 24,

[18] In arguing that the mail fraud, wire fraud and bank fraud statutes do not incorporate the common law elements of fraud, the government points out in its response to the petition that while plaintiffs must prove "justifiable reliance" on a defendant's misrepresentations or omissions to recover for civil fraud, the government is not required to make such a showing in a mail fraud, wire fraud, or bank fraud prosecution. Brief for the United States at 7 (citing *United States* v. *Coffman*, 94 F.3d 330, 333-334 (7th Cir. 1996)). But the reason that reliance is not an element of these crimes is simply, as Chief Judge Posner explained in *Coffman*, that "[t]he statute punishes the scheme * * * rather than the completed fraud. It punishes, in short, the attempt to defraud." 94 F.3d at 333 (citation omitted). Because a defendant can violate the mail fraud statute merely by hatching a "scheme or artifice to defraud" and mailing a letter, it is irrelevant whether the scheme successfully induced reliance by its intended victims. The "scheme or artifice" still must be one, however, that, if successful, would actually "defraud" in the common-law sense.

§ 1 (1757) (Eng.).[19] From the beginning, cases applying the statute held that it applied only to false statements that would actually influence the victim's action. Indeed, the first such reported case established the necessary relationship between the statement and the transaction: "If the intent be made out, and the false pretence used *in order to effect it*, it brings the case within [the] statute." *Young* v. *The King*, 3 Term Rep. 98, 104 (K.B. 1789) (emphasis added). See also F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 451-452 (1846).

When Congress enacted the mail fraud statute, American courts, too, had held without exception that false statements immaterial to a transaction were insufficient to support a conviction for criminal fraud. See WHARTON, *supra*, at 451-463 (collecting cases). In 1872, the same year Congress passed the mail fraud statute, a leading treatise remarked that "these [criminal fraud] statutes are construed in reference to the spirit and reasons of the common law; and they do not therefore extend, as the non-professional reader might suppose, to every imaginable kind of false pretence." 1 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 586, at 354-355 (5th ed. 1872) (collecting cases). Thus, for example, in *Commonwealth* v. *Drew*, 19 Pick. 179, 183 (Mass. 1837), the court held that lying about one's name is not criminal unless the false name would contribute to the victim's decision to advance money. See also, *e.g.*, *Woodbury* v. *State*, 69 Ala. 242, 245-246 (1881) (criminal fraud conviction reversed because, although the defendant gave a false address, it was not a "material fact"); *Commonwealth* v. *Hershell*, Thacher's Cr. Cases 70, 78-79 (Boston Mun. Ct. 1824) (conviction required that the false statement would be a "material inducement"). In this country, as in England, a "false representation, to suffice for

[19] The statute was revised three times, in 1812, 1827, and again in 1861, but none of these modifications touched on the question of materiality, and all retained the requirement of an intent to "defraud." See 52 Geo. 3, ch. 64 (1812) (Eng.); 7 & 8 Geo. 4, ch. 29, § 53 (1827) (Eng.); 24 & 25 Vict., ch. 96, § 88 (1861) (Eng.).

false pretenses, must be as to a material fact." 2 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 8.7(b)(4) (1986).[20]

It would be remarkable, to say the least, if the drafters of the mail fraud statute chose to prohibit a "scheme or artifice to defraud" — using language with a well-established common-law meaning — but actually intended to create an entirely new species of crime without any historical precedent in the common law, and without any such indication in the text of the statute.

2. Nor does the legislative history contain any suggestion that Congress meant to strip the term "defraud" in the mail fraud statute of its settled meaning and to criminalize a category of conduct — immaterial misrepresentations and omissions — for which there had previously never been civil or criminal liability.

The mail fraud statute, first proposed in 1870 as part of a revision of the postal code, was enacted in 1872. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 293, 323. The new law was "intended to prevent the frauds which are mostly gotten up in the large cities of New York and Philadelphia, chiefly in New York, by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). The

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[20] Other early fraud-related crimes also required materiality. For example, "cheat," the use of altered weights or measures to defraud, was criminal at common law largely because, "according to the necessary customs and order of society, every man must be supposed to place confidence" in such measures. 1 BISHOP, *supra*, § 585, at 354. See also 4 W. BLACKSTONE, COMMENTARIES *157-158 (describing other forms of cheat such as "playing with false dice"). An altered measure is *always* material because it affects the amount of product a buyer receives for his money. Forgery was the "false making or *materially* altering, with intent to defraud, of any writing." 1 BISHOP, *supra*, § 572, at 347 (footnotes omitted, emphasis added). And the crime of perjury required a false statement "in some point material to the question in dispute," and not "in some trifling collateral circumstance, to which no regard is paid." 4 BLACKSTONE, *supra*, at *137. See also *Kungys*, 485 U.S. at 769.

schemes that the statute targeted — characterized as "frauds" — clearly involved material deception. Representative Farnsworth described "circulars and letters sent out * * * from various bogus offices in the large cities, professing to be from agents of some enterprise or other, which are well enough upon their face, but upon examination are found to be entirely bogus." *Ibid.* In many cases, the big-city con-men that Representative Farnsworth referred to would fool their victims by proposing to sell counterfeit money. With their letters, they would

> send a genuine twenty-five or fifty cent currency note. The person receiving the circular may not be particularly ignorant, but being somewhat greedy, he shows it to some banker or broker, who, of course, pronounces it to be good money. Thereupon, the countryman immediately sends to the address of the agent, in New York, for instance, ten, fifteen, or twenty dollars, with an order for so much as it may purchase. A box or package is sent to him, perhaps, which upon being opened is found to contain waste paper, sawdust, or may be bogus money.

Ibid. These schemes plainly involved material misrepresentations: the deceit (representing samples of genuine currency as counterfeit, and falsely promising to send counterfeit currency) went to a matter important to the transaction and obviously had a predictable tendency to affect victims' decisions. Thus, Representative Sargent (who questioned the wording of the statute) described the cited schemes as "the frauds of those nefarious rascals who send out their circulars *to entrap the unwary* into purchasing counterfeit money." *Ibid.* (emphasis added). Nothing about these scams, nor anything else in the legislative history, suggests that in enacting the mail fraud statute Congress sought to create a new species of "fraud" for which materiality was not required.[21]

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[21] There is no reason to think that Congress in 1872 had any intention of redefining the concept of fraud. The mail fraud statute, entitled "Penalty for Misusing the Post-Office Establishment," did not criminalize fraud *per se*, but rather sought to proscribe the use of the post office to effectuate a

In 1889, the statute was amended by "language expressly reaching schemes of the period, many of the same nature as those mentioned by Representative Farnsworth in 1870." *McNally* v. *United States*, 483 U.S. 350, 357 n.6 (1987). See Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873.[22] As this Court has observed, the new language was "nothing more than a reconfirmation of the statute's original purpose in the face of some disagreement among the lower federal courts as to whether the statute should be broadly or narrowly read." *McNally*, 483 U.S. at 357 n.6.

The statute was further revised in 1909, with an amendment adding the words "or for obtaining property by means of false or

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fraudulent scheme. The "gist" of the crime, it was often said, was the mailing. See generally J. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980). As this Court recognized in *Parr*, Congress left the question of what constitutes a "scheme or artifice to defraud" under the mail fraud statute "for determination under other laws." 363 U.S. at 389. See also W. Gray, Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 568 (1980) ("Congress in the fraud legislation of 1872 did not use the term 'fraud' in some new and technical way, but rather intended to prohibit schemes that were within the conventional usage of the term and involved use of the federal mails.").

[22] The new language made explicit the statute's applicability to schemes involving any

> spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle', or 'counterfeit-moneyfraud', or by dealing or pretending to deal in what is commonly called 'green articles', 'green coin', 'green goods', 'bills', 'paper goods', 'spurious Treasury notes', 'United States goods', 'green cigars', or any other names or terms intended to be understood as relating to such counterfeit or spurious articles * * *.

fraudulent pretenses, representations, or promises" after the original phrase "any scheme or artifice to defraud." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. Nothing in the legislative history provides any support for the assertion that Congress meant this revision to remove the element of materiality from the offense. The Senate Report simply included in the margin a lengthy citation of what appears to be every reported mail-fraud decision at the time, including *Durland* v. *United States*, 161 U.S. 306 (1896). See S. Doc. No. 68, 57th Cong., 1st Sess., pt. 2, at 63, 64 (1901). On the Senate floor, the only commentary regarding the amendment concerned a change that allowed prosecution when the mailing was made from outside the United States. Otherwise, the legislation's sponsor, Senator Heyburn, commented, "I do not think there is any other change, which is not obvious upon the face of the bill, that needs any further explanation." 42 Cong. Rec. 1026 (1908).

The 1909 revision was the "last substantive amendment of the statute." *McNally*, 483 U.S. at 357 n.6. The outdated list of exemplary schemes was removed in 1948 by an amendment "designed to remove surplusage without changing the meaning of the statute." *Ibid.* Since then, the statute has been subject only to several minor "technical" changes. *Ibid.*[23] In short, legislative history offers no support for the argument that the term "defraud," as used in the mail fraud, wire fraud, and bank fraud statutes, requires anything less than a material misrepresentation or omission.

3. Against this backdrop, it is no surprise that turn-of-the-century courts consistently read the new law in accordance with the traditional understanding that materiality is an element of a "scheme or artifice to defraud." For example, with language strikingly similar

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[23] There has been one additional substantive amendment since *McNally*. After *McNally* held that the mail fraud statute was "limited in scope to the protection of property rights," 483 U.S. at 360, Congress enacted 18 U.S.C. § 1346, which specifies that the statute applies to "a scheme or artifice to deprive another of the intangible right of honest services." Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508 (1988). This amendment has no bearing on the questions presented.

to the "natural tendency" test articulated by this Court in *Kungys*, 485 U.S. at 770, one of the earliest reported decisions interpreting the mail fraud statute explained that "a scheme to defraud within the meaning of" the mail fraud statute was "[a]ny scheme, *the necessary result of which would be the defrauding of somebody*." *United States* v. *Jones*, 10 F. 469, 470 (C.C.S.D.N.Y. 1882) (emphasis added). See also *United States* v. *Owens*, 17 F. 72, 74 (E.D. Mo. 1883) ("the act was designed to strike at *common schemes of fraud*, whereby, through the post office, circulars, etc., are distributed, *generally to entrap and defraud the unwary*") (emphasis added).

This Court did not address the significance of the statutory term "scheme or artifice to defraud" until 1896. That year, in *Durland*, 161 U.S. at 312, the Court considered a defendant's argument "that the statute reache[d] only such cases as, at common law, would come within the definition of 'false pretenses,' in order to make out which there must be a misrepresentation as to some existing fact, and not a mere promise as to the future." Rejecting this argument, the Court explained that the mail fraud statute did not require a misrepresentation of a past or existing fact, but rather applied to "any scheme or artifice to defraud." *Id.* at 313.

To illuminate the meaning of the statute, the *Durland* Court did not find it necessary to look beyond traditional notions of fraud. First, the Court noted that "[s]ome schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. Punishment because of the fraudulent purpose is *no new thing*." *Ibid.* (emphasis added). The Court then quoted its opinion in *Evans* v. *United States*, 153 U.S. 584, 592 (1894), for the proposition that if a person buys goods on credit, "knowing that he will not be able to pay for them, and with an intent to cheat the vendor, *this is a plain fraud, and made punishable as such by statutes in many of the States*." 161 U.S. at 313 (emphasis added). In determining what was meant by "scheme or artifice to defraud," the *Durland* Court never suggested that "fraud" for purposes of the mail fraud statute was a new or more expansive

creature than "plain fraud." Instead, the Court invoked traditional fraud principles and state law to construe the statute's reach.[24]

Durland also suggests that a representation's predictable tendency to influence the decision-making of its audience, *i.e.*, materiality, was central to the Court's conception of fraud:

> *It is common knowledge that nothing is more alluring* than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with *appeals to the cupidity of all*. In the light of this the statute must be read * * *.

Ibid. (emphasis added). In holding that the mail fraud statute is not co-extensive with the crime of false pretenses, the *Durland* Court reinforced the presumption that the mail fraud statute reaches no further than the elements of common-law fraud, and thus incorporates the common-law element of materiality.

In the mail fraud statute's early years, materiality was a central concern. For this reason, courts carefully distinguished mere "puffing" from "false representations of material facts which are in their nature calculated to deceive." *Harris* v. *Rosenberger*, 145 F.

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[24] The *Durland* Court was correct that the traditional conception of "fraud" was sufficiently broad to encompass promises regarding the future. "[A]n American decision as early as 1839 [held] that deceit would lie for a false promise, and a considerable number of decisions that false promises were sufficient fraud for purposes of rescission were handed down in the decade preceding the *Durland* case." A. Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967, 978 n.51 (1953) (citation omitted). See also, *e.g.*, F. MONCREIFF, A TREATISE ON THE LAW RELATING TO FRAUD AND MISREPRESENTATION 98 (1891) (a "representation as to intention, reason, motive, opinion, or law may * * * be a representation of a matter of fact, and the ground of an action"); M. BIGELOW, A TREATISE ON THE LAW OF FRAUD ON ITS CIVIL SIDE 476 (1888) (a statement concerning the future "if precise and definite, may imply a present fact, and mislead accordingly").

449, 455 (8th Cir. 1906). For instance, in *Faulkner* v. *United States*, 157 F. 840 (5th Cir. 1907), the Fifth Circuit reversed a conviction where the defendant had been found guilty of mail fraud after obtaining money by advertising his purportedly vast cold-storage facility. The court noted that there "was conflict in the evidence as to the size of the place, *but that seems to us immaterial*. The fact is he was simply advertising his business, and, if the advertisement contains some exaggerations, that does not constitute a scheme to defraud." *Id.* at 841 (emphasis added).

The materiality standard also was expressed as a requirement that misrepresentations not only be "designed" to defraud, but also "reasonably adapted" for the purpose — an inquiry that naturally turned on their capacity to achieve the desired end. See *Brooks* v. *United States*, 146 F. 223, 227 (8th Cir. 1906) (the mail fraud statute "contemplates any scheme * * * provided only it was designed and reasonably adapted to deceive and defraud"); *Lemon* v. *United States*, 164 F. 953, 957 (8th Cir. 1908) (upholding indictment because, among other things, it alleged a scheme or artifice "well designed and adapted to deceive").

Finally, the materiality requirement was evident in early mail fraud jury instructions. In *Flachskamm* v. *United States*, 127 F. 674 (7th Cir. 1904), the defendants had placed an advertisement offering a "fur collarette" and certain other objects to persons who sold two dollars' worth of jewelry for them. The collarettes were never delivered, and the other objects did not live up to their billing. The trial judge instructed the jury to consider the natural, predictable effect of the defendants' representations: "The reasonable construction which the ordinary reader into whose hands the advertisement might fall would put upon that advertisement gentlemen, in my mind, is the basis which must control your verdict in this case." *Id.* at 676. The jury was further told to consider whether there was a material difference between what was promised and what was delivered:

> [If you determine that] the articles given in return for the remittances of Two Dollars * * * were different in description and quality from the articles named in the advertisement and that such *difference in description and quality from the articles named [was] so great as to amount to fraud*, then you will find the defendants guilty. * * * [Y]ou will not find the defendants guilty unless you find that the articles given in exchange for the Two Dollar remittance were *so different and so inferior both in quality and description as to amount to fraud*.

Ibid. (emphasis added).[25]

In short, during the critical period when the mail fraud statute was adopted and revised, the statute was understood by this Court and by the lower courts charged with applying it to include the established element of materiality. There is simply no evidence that Congress intended anything else.

4. The presumption that Congress intended the term "defraud" to include the common-law requirement of materiality also is strengthened by the fact that other language in the mail fraud, wire fraud, and bank fraud statutes independently confirms that materiality is an element of these crimes.

For example, the statutes prohibit a "scheme or artifice" to commit fraud. It has never been doubted that similar language in the securities laws requires proof of materiality. For example, this Court has always understood § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), which prohibits a "manipulative or

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[25] Other jury instructions explained that a scheme must include representations possessing a natural tendency to entrap the unwary.

> A commonplace definition * * * likens an artifice to a dawjack, or artificial bait, *which lures an unsuspecting fish to bite* at the gaily colored wooden minnow covered with fish hooks, disguised by their color so that the fish is caught; hence it would seem that *any scheme, artifice, or plan, the necessary result of which would be the defrauding of somebody, would be a scheme and artifice to defraud*.

M. TAYLOR, THE LAW OF POSTAL FRAUDS & CRIMES 182-183 (1931) (emphasis added). The instruction's final clause is identical to the language used in 1882 by the court in *Jones*, 10 F. at 470.

deceptive device or contrivance," but does not use the word "material," to contain a materiality element. See *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988) (adopting materiality standard for § 10(b)); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 474-476 (1977) (complaint did not allege violation of § 10(b) when it "failed to allege a material misrepresentation or material failure to disclose"). See also generally 7 L. LOSS & J. SELIGMAN, SECURITIES REGULATION 3421-3431, 3437 (3d ed. 1991). Just as telling, in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 152-153 (1972), this Court addressed two provisions of Rule 10b-5, 17 C.F.R. § 210.10b-5, neither of which use the word "material" but which do prohibit a "device, scheme, or artifice to defraud" and a "course of business which operates * * * as a fraud or deceit." The Court held that these provisions were violated "because the defendants devised a plan and induced [the victims] to dispose of their shares without disclosing to them *material* facts." 406 U.S. at 153 (emphasis added). As the Court explained, "[a]ll that is necessary" to make out a violation of these provisions "is that the facts withheld be material." *Ibid.* This Court's securities decisions thus would make no sense if the phrase "scheme or artifice to defraud," as used in the mail, wire and bank fraud statutes, did not likewise require proof of materiality.

The language added to the mail fraud statute in 1909 also shows that Congress understood materiality to be an element of the crime. The 1909 amendment, which codified this Court's holding in *Durland*, added references to "pretenses" and "representations." As discussed *supra* at 36-38, the crime of false pretenses always has included a materiality element. This Court also has explained that the word "misrepresentation" is "commonly associated" with a materiality requirement, and implies a materiality element "in many contexts," including at common law. *Kungys*, 485 U.S. at 781. See also *Fedorenko* v. *United States*, 449 U.S. 490, 507 (1981) (agreeing with the government that statute prohibiting certain "misrepresentation[s]" "only applies to willful misrepresentations about 'material' facts").

It is simply not plausible to suppose that Congress used language so strongly implying materiality while actually intending, in the teeth

of the common-law meaning of the word "defraud," that the mail fraud, wire fraud, and bank fraud statutes should be extended to cover schemes involving immaterial falsehoods.

5. In this case, the court of appeals rested its conclusion that materiality is not an element of the mail fraud, wire fraud, and bank fraud statutes on a misunderstanding of this Court's decision in *Wells*, which held that materiality is not an element of 18 U.S.C. § 1014. Indeed, nothing in *Wells* even remotely suggests that Congress intended the term "defraud" in the mail, wire and bank fraud statutes to carry anything less than its common-law meaning.

The court of appeals believed that these statutes are similar to § 1014 in that they "do not contain the word 'material.'" Pet. App. 7a, 9a. But as explained above, the mail, wire and bank fraud statutes actually are *unlike* § 1014 — which merely prohibits certain "false statement[s]" — in that their language *does* carry a common-law meaning that incorporates materiality. See, *e.g.*, *Field*, 516 U.S. at 69 (Congress's use of "common-law terms * * * impl[ies] elements that the common law has defined them to include").

The court of appeals also stressed that the current version of the mail fraud statute, on which the wire fraud and bank fraud statutes were based, is like § 1014 in that it "was enacted as part of the recodification of the federal criminal code in 1948." Pet. App. 7a. But this Court's decision in *Wells* does not stand for the general rule that any statute enacted as part of the 1948 recodification does not contain a materiality element. *Wells* relied on the fact that in 1948 Congress enacted § 1014 as a conglomeration of 13 earlier statutes, of which "10 had previously contained no express materiality provision and received none in the recodification, while 3 of the 13 had contained express materiality requirements and lost them in the course of consolidation." 519 U.S. at 492-493. The mail fraud statute, on the other hand, has always prohibited a "scheme or artifice to defraud." In 1948, the section was simply renumbered, "surplusage was eliminated[,] * * * and the section [was] simplified without change of meaning." 18 U.S.C. § 1341 Historical and Revision Notes. See also *McNally*, 483 U.S. at 357 n.6.

Finally, the Eleventh Circuit emphasized that Congress "has employed the terms 'material representation' and 'material misrepresentation' in other statutes." Pet. App. 9a. The court concluded from this that Congress does not "intend[] to make materiality an element under a statute whenever it employs the term 'representation' in that statute." *Ibid.* It is not the term "representation," however, that is dispositive of the question presented. Instead, it is Congress's use of the word "defraud" that obviated the need to use the word "material" in the mail fraud, wire fraud and bank fraud statutes because materiality already was an element of common-law fraud. There is no such thing as an "immaterial" fraud. If the court of appeals' analysis were accepted, *no* "fraud" statute would ever have a materiality requirement unless Congress explicitly used the word "material" in the statute. That is not, and cannot be, the law.

C. Due Process And The Rule Of Lenity Also Require That The Mail Fraud, Wire Fraud, And Bank Fraud Statutes Be Read To Include A Materiality Element.

Even if there were any ambiguity as to the meaning of the mail fraud, wire fraud and bank fraud statutes (which there is not), principles of due process and fair warning and also the rule of lenity independently require that the statutes be read to include a materiality element.

1. This Court has "often emphasized the need for clarity in the definition of criminal statutes, to provide 'fair warning * * * in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Hubbard* v. *United States*, 514 U.S. 695, 701 n.4 (1995) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 26 (1931) (Holmes, J.)). See also, *e.g.*, *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939) ("All are entitled to be informed as to what the State commands or forbids"). A person of ordinary intelligence certainly would conclude from the language of the mail fraud, wire fraud, and bank fraud statutes that they only criminalize "fraud," which, as explained above, has always required proof of materiality. No one would think that he or she could be jailed for 30 years and fined $1,000,000, as all three statutes provide, for a

scheme to "defraud" through immaterial misrepresentations or omissions. In *Williams* v. *United States*, 458 U.S. 279, 286 (1982), for instance, this Court refused to read § 1014's prohibition on "false statement[s]" as covering bad checks because "'false statement' is not a term that, in common usage, is often applied to characterize 'bad checks.'" The same reasoning counsels against any reading of the mail fraud, wire fraud, and bank fraud statutes that would dispense with the element of materiality.

"Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal." *Buckley* v. *Valeo*, 424 U.S. 1, 77 (1976). Any reading of the mail fraud, wire fraud, and bank fraud statutes that omits materiality would raise serious constitutional doubts, and must therefore be rejected for this reason as well. *E.g.*, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

2. The rule of lenity also leads to the same conclusion. It is "the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.'" *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978) (quoting *United States* v. *Bass*, 404 U.S. 336, 348 (1971)). As this Court explained in *McNally*, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." 483 U.S. at 359-360. If the use of the word "defraud" — to say nothing of the terms "scheme or artifice," "representation," and "pretenses" — in the mail fraud, wire fraud, and bank fraud statutes does not conclusively establish that materiality is an element of these crimes, the statutes are at least ambiguous in this respect. Because "text, structure, and history fail to establish that the Government's position is unambiguously correct," the rule of lenity requires "resolv[ing] the ambiguity in [petitioner's] favor." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). See also, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 148 (1994); *Crandon* v. *United States*, 494 U.S. 152, 158

(1990); *Liparota* v. *United States*, 471 U.S. 419, 427 (1985); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971).

* * * *

For all of the foregoing reasons, it is clear that materiality is an essential element of the federal mail fraud, wire fraud and bank fraud statutes, 18 U.S.C. §§ 1341, 1343, 1344. Accordingly, the district court reversibly erred by removing materiality from the jury's consideration of the mail, wire and bank fraud counts of the indictment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1998